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December 10, 1998

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TWA325
Washington, D.C. 20554

Re: RM Docket No. 98-201

Dear Ms. Salas:

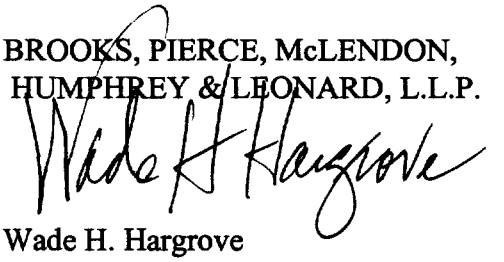
Transmitted herewith, on behalf of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, Fox Television Affiliates Association, and the NBC Television Affiliates Association, are an original and eleven (11) copies of ***Comments of the ABC Television Affiliates Association, CBS Television Affiliates Association, Fox Television Affiliates Association, and the NBC Television Affiliates Association*** in the above referenced proceeding.

In light of the expedited nature of this proceeding, the scope of the issues covered and the length of the enclosed comments, we believe that good cause is shown to justify a waiver of section 1.49(c) to allow for submission of an eight-page summary. It is respectfully requested that the Commission grant such a waiver for the enclosed comments.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.



Wade H. Hargrove
Counsel for the ABC Television Affiliates Association and for the Fox Television Affiliates Association

WHH/atd

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals to	)	CS Docket No. 98-201
Unserved Households for Purposes of the	)	RM No. 9335
Satellite Home Viewer Act	)	RM No. 9345
	)	
Part 73 Definition and Measurement of	)	
Signals of Grade B Intensity	)	

To: The Commission

JOINT COMMENTS OF THE
ABC, CBS, FOX, AND NBC
TELEVISION NETWORK AFFILIATE ASSOCIATIONS

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December 11, 1998

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SUMMARY

"We're getting up into that rarefied air right now."*

The Satellite Home Viewer Act ("Act" or "SHVA") is a copyright statute—not a telecommunications policy statute. Congress has entrusted the enforcement of the copyright laws to the federal courts. Notwithstanding the Commission's expansive authority to administer and enforce the nation's telecommunications laws, the Commission is without authority to administer, interpret, or enforce the nation's copyright laws. Thus, the authority of the Commission to take *any* action in this proceeding—other than making policy recommendations to Congress—is quite limited.

The Commission cannot, as the satellite industry requests, rewrite the Act's definition of an "unserved household" by increasing the signal intensity levels required by the Act for a signal of Grade B intensity; nor may the Commission create, for purposes of the Act, "presumptive" standards about where acceptable levels of local service are "presumed" to exist; nor may the Commission take any of the other actions requested by the satellite industry that would shrink the geographical area of copyright protection that Congress prescribed in the Act for broadcast networks and their local affiliates. It would be presumptuous in the extreme for the Commission to assume that Congress did not know what it was doing when it adopted the Act's Grade B standard in 1988, or when it incorporated that standard in the Cable Act of 1992, or when it amended the Act in 1994, or, more recently, when both the Senate and House committees earlier this year held extensive hearings on

* Eddy Hartenstein, President of DirecTV, on DirecTV's unprecedented consumer acceptance and competitiveness with cable, Multichannel News, Sept. 21, 1998, at 8.

the issue and declined to amend or modify the Act's Grade B signal intensity standard.

Accordingly, notwithstanding recent letters from influential members of Congress, the thousands of letters and e-mails (skillfully orchestrated by the satellite industry) from frustrated and defrauded consumers, and the desire of both the Commission and Congress to facilitate competition to cable, the Commission's ability to act in this proceeding is circumscribed both by law and by the Act's legislative purposes, objectives, and intent. Although the Commission cannot rewrite the Act, it can make legislative recommendations to Congress consistent with the public policy objectives of the Act.

As the Commission recognizes in its *Notice*, the Act had a dual purpose: (1) to enable households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) to protect the integrity of the copyrights that make possible the existing free, over-the-air national network/local affiliate broadcast distribution system. The Act represents a careful balance between the public interest, on the one hand, in allowing households located beyond the reach of a local network station to secure access to broadcast network programming and, on the other hand, in preserving "localism" by protecting the copyrights each local network station has for the broadcast of its network programming in its local market. EchoStar candidly acknowledged in a statement filed earlier this year with the Copyright Office that Congress was concerned that "importation of distant signals into markets served by the local affiliate would disrupt the network-affiliate relationship and threaten the local affiliate's revenues."

Congress recognized that an important public interest distinction between the services offered by satellite carriers and those offered by local affiliates is that satellite services are available only to those who can afford to *pay* for them while broadcast services provided by local affiliates are *free* for everyone.

The assurance of continued access by the public to the nation's *free, universally-available, local* broadcast service was a core policy objective of the Act. Any action taken by the Commission in connection with the Act must be designed to promote—not impair or impede—local television broadcast service. The Commission actions proposed by the satellite industry would do just the opposite and, therefore, must be rejected.

The history of the marketing and reselling of broadcast signals by the satellite industry is a history of fraud and deception. Satellite carriers have been engaged in the larceny of intellectual property on a scale unprecedented in the history of the television industry. The satellite industry's record of copyright infringement is, as confirmed by recent federal court decisions, a record of arrogant indifference to the law. Of PrimeTime 24's satellite broadcast network subscribers in the Dallas-Fort Worth market, for example, *91%* are located within the local affiliate's Grade A contour, in Miami, *86%* are located within the local affiliate's Grade A contour, and in Atlanta, *89%* are located within the local affiliate's Grade A contour. Satellite carriers, obviously, have not been and are not now targeting their broadcast network service to "rural areas," as Congress envisioned in the Act. Rather, the service is marketed, promoted, targeted, and sold to the very heart of each local television station's market.

Contrary to arguments by the satellite industry, the existing Grade B signal intensity standard provides an acceptable level of picture quality and television service today—just as it did when the standard was established. The Commission affirmed the standard in its recent DTV proceeding. In that proceeding, the Commission adopted a comprehensive table of DTV channel allocations to maximize the availability of DTV service for the nation. Those channel allotments were made to replicate the *existing analog service* areas of local stations. Surely, had the Commission not had confidence in the technical integrity of the Grade B standard, *it would not have predicated the*

nation's DTV service for the 21st century on that standard. Plainly, the Commission believed then—and hopefully does now—that the existing Grade B signal intensity levels provide a desirable level of television service and picture quality. If anything, given the technological improvements in television equipment and, especially, the reduction in receiver noise figures, Grade B signal intensity levels, if changed at all, should be lowered—rather than increased—to reflect acceptable levels of service.

A study of twelve representative network affiliate stations from various market sizes shows that if the Grade B service area were shrunk to an area equivalent to that of the existing Grade A area, local stations would lose copyright protection, on the average, for some 33% of the television households they are now projected by Longley-Rice to serve. The loss in homes served would be as high as *87%* in some markets. And the magnitude of these losses in homes served is far less extreme than would be the case if EchoStar's 99%/99%/99% Longley-Rice inputs were adopted.

The loss of these households from local service to satellite service is more than a theoretical loss. Nielsen data show that, in some markets, the diversion to viewing of distant duplicating network stations in satellite homes already exceeds 18% of all television households in the market. Those are *real* numbers, representing *real* viewers and a resulting *real* loss of revenue for local television stations. Thus, once a local station loses its network nonduplication protection, the diversion of viewing to duplicating distant network stations is substantial.

The loss by a local affiliate of viewers translates into a loss of revenue. Without program exclusivity, local television stations—operating on a single channel, supported by a single, advertising revenue stream—are placed at a hopeless competitive disadvantage against multi-channel satellite companies with multiple revenue streams. None of this, of course, is new. The Commission long ago recognized the economic necessity of program exclusivity for local television service by

adopting network nonduplication and syndicated program exclusivity rules prohibiting the importation by cable of distant duplicating network stations.

The issue here for the Commission is not the economic impact that a loss of program exclusivity would have on a particular broadcaster, but, rather, the economic consequences the loss of program exclusivity will have on *local television service.* In recognition of the importance of free, over-the-air television to the national discourse, Congress—both in Section 307(b) of the Communications Act and Section 119 of the Satellite Home Viewer Act—affirmed the national interest of providing for a system of *local* television broadcast service. Congress designed a national telecommunications policy designed to afford each community, to the fullest extent, a *free local* broadcast outlet for *local* self-expression. The national network/local affiliate television program distribution system is the cornerstone of that policy and of the nation's *free,* over-the-air television program service. Local emergency information, local news, local weather, local public service announcements, local political, educational and public affairs programming, and local television advertising messages will not be seen in each local market if the Commission capitulates to the satellite industry lobby and reverses its 50-year regulatory policy of fostering *free*, over-the-air local television service. The financial marginalization of the nation's free, over-the-air television service would be tragic for all television viewers; it would be especially so for the more than 30 million households—some 30% of all American television households—that cannot afford to or do not subscribe to a paid subscription service and are dependent on the existing *free*, over-the-air television program distribution system.

The loss of program exclusivity protection would also frustrate the Congressional and Commission initiative for transition from the existing terrestrial television analog service to a digital television service. Local stations simply cannot afford the cost of digital conversion if the

Commission undercuts their ability to serve their local markets. Every household—every viewer—matters in today's fiercely competitive television market.

The "secret" the satellite industry conceals from Congress and the Commission—yet which it loudly touts on Wall Street—is that the satellite industry is enjoying unprecedented consumer acceptance and economic success. The satellite industry does not need yet another government-granted copyright subsidy. The argument the satellite industry makes in Washington that the copyright laws should be bent further in its favor so it can compete with cable is contradicted by the facts:

* Satellite dishes have now become the "fastest growing consumer-electronics product in history."

* 75% of DirecTV's new subscribers come from cable-passed homes.

* A satellite industry-sponsored study reports that only 8% of households in highly competitive markets mentioned the absence of local channels as a factor in the decision not to subscribe to satellite; in another study only 4% of cable subscribers weren't interested in satellite service because of a lack of local station availability on satellite.

* EchoStar, with its just-announced acquisition of New Corp. and MCI Worldcom's orbital slot, says it will offer consumers a 300 and 500 channel package with "local channels."

* The satellite industry is promoting the use of antennas in new and creative ways to provide local service for "free."

* The satellite industry is telling its subscribers that the combination of DBS and an off-air antenna is "unbeatable" and that today's antennas are capable of bringing in a high quality signal for just about *every* urban or suburban homeowner.

* DBS subscribership increased by almost 44% during the 12-month period from July 1, 1997, to July 1, 1998. As of the end of October 1998, there were some 10 million satellite subscribers, and financial experts project there will be a satellite dish on 80% of American homes in 10 years or less.

* EchoStar's publicly traded stock is currently one of the "hottest" on Wall Street.

The satellite industry has enjoyed a great "political" ride on the back of the cable competition argument. The argument, however, has now been undermined by the satellite industry's unprecedented competitive and economic success.

The solution for the Commission is simple:

* The Commission should recommend to Congress that local-into-local legislation, with appropriate must-carry and retransmission consent provisions, be enacted with all due speed. The Affiliate Associations will work with the Commission, the satellite industry, and Congress to expedite enactment.

* The Commission should undertake appropriate efforts to stop the consumer fraud perpetrated by its satellite carrier licensees. To that end, the Commission should issue letters of admonishment to its satellite carrier licensees—or impose other appropriate sanctions for the fraud—and recommend to Congress that legislation be enacted to require satellite carriers to disclose in bold and conspicuous type in all written and oral sales presentations the limitations on the statutory copyright license held by satellite carriers for the delivery of distant broadcast network stations.

* The Commission, if it concludes it necessary or appropriate, may recommend that Congress enact or authorize the Commission to adopt "presumptive" standards of service based on the Longley-Rice point-to-point methodology in order to minimize the number of homes for which site testing is likely to be necessary. An appropriate "presumptive" standard—coupled with a loser pays mechanism for the cost of testing and a reliable, yet cost-efficient, testing methodology that assures advance notice to each party and that is modeled on the testing regime in the voluntary compliance agreement between PrimeStar, Netlink, and the broadcast industry—would eliminate much of the current "white area" controversy.

Finally, the marketplace, itself, unless skewed by action taken by Congress or the Commission, will, in time, solve the local station reception problem. The genius of the marketplace should not be underestimated. The satellite and broadcast industries have confidence in the ability of new technologically-improved, attractive, over-the-air antennae to solve the reception issue. As

noted earlier, DirecTV is making these new antennae available to satellite subscribers at highly discounted rates. This voluntary practice should not be discouraged. Regulatory action by the Commission that might create disincentives for or minimize the use of antennae should be avoided. Some consumers elect to receive local television stations by cable television, and regulatory actions should not be taken to discourage consumers from exercising that reception option. In short, the Commission should refrain from any action that might unwittingly interfere with the consumer choice of how best to receive local stations.

Until broadcast stations began to enforce the Act and protect their copyrights, satellite carriers had no real incentive to solve the local reception issue. Now they do. Unless the Commission removes that incentive, the satellite industry will find a solution—and it will be vastly more efficient for consumers than any regulatory solution Congress or the Commission could craft.

Whatever action, if any, the Commission may take, it is respectfully submitted that the action must be consistent with the Act's core objective of protecting the integrity of the copyright each local network station now has for the delivery of its network's programming within its Grade B service area.

* * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals to	)	CS Docket No. 98-201
Unserved Households for Purposes of the	)	RM No. 9335
Satellite Home Viewer Act	)	RM No. 9345
	)	
Part 73 Definition and Measurement of	)	
Signals of Grade B Intensity	)	

To: The Commission

JOINT COMMENTS OF THE
ABC, CBS, FOX, AND NBC
TELEVISION NETWORK AFFILIATE ASSOCIATIONS

I.
Preliminary Statement

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the Fox Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Affiliate Associations"), by their attorneys, hereby submit these comments in response to the Commission's *Notice of Proposed Rule Making* ("*Notice*"), FCC 98-302, released November 17, 1998, in the above-captioned proceeding. The Affiliate Associations represent more than 800 local television broadcast stations throughout the nation that are affiliated with one of the four major television broadcast networks.

These comments address the legislative history, purposes, and objectives of the Satellite Home Viewer Act ("Act" or "SHVA"); the extent to which the satellite industry has defrauded the American public and abused the Act; the nature of the copyright modifications requested by the

satellite industry; the effect of those modifications, if granted, on the nation's free, universally-available local television broadcast service, as well as the Commission's broadcast, satellite, and cable television regulatory schemes; the statutory limitations on the Commission's authority to take action in this proceeding; and the absence of any public policy justification or need for the Commission to manipulate its rules and reduce the copyright protections afforded by the Act.

In support thereof, it is respectfully shown as follows:

II.
The Act Is A Copyright Statute And The Commission Is Without Authority To Interpret, Enforce, Preempt, Or Abrogate It

The Satellite Home Viewer Act (17 U.S.C. § 119) is a copyright statute—not a telecommunications policy statute. Congress has entrusted the enforcement of the nation's copyright laws to the federal courts.[1] Notwithstanding the Commission's expansive authority to administer and enforce the nation's telecommunications laws, the Commission is without authority to administer or enforce the nation's copyright laws. Thus, the authority of the Commission to take any action in this proceeding—other than making policy recommendations to Congress—is limited.

In the Copyright Act, Congress, pursuant to its constitutional authority in the Copyright Clause, Art. I, § 8, cl. 8, has granted an exclusive, albeit time-limited, right in original works of authorship fixed in a tangible medium of expression.[2] A copyright, therefore, is a constitutionally- and congressionally-sanctioned property right. One of the principal exclusive rights subsisting in copyright is the right to choose whether and how one's copyrighted works can be distributed to

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[1] 17 U.S.C. §§ 119(a)(5)(A), 501, 502-506, 509.

[2] *See id.* § 102(a).

others.[3]

The Act grants a limited and conditional compulsory copyright license to satellite carriers to enable them to distribute distant network signals to a narrow class of viewers. The Act's compulsory license is an express limitation on the distribution rights of creators of original works of expression, and, thus, is in derogation of the normally broad power to exercise control over one's copyrighted works.[4] The compulsory license permits satellite carriers to retransmit copyrighted material without having to obtain the express permission of the owner. Compulsory licenses are not favored in the law and, therefore, are narrowly construed. As stated by the Fifth Circuit, because a "compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his [copyrighted work] . . . it must be construed narrowly, lest the exception destroy, rather than prove, the rule."[5]

Nothing in the Act prevents satellite carriers from obtaining, in the marketplace, directly from the owners, copyright licenses to distribute copyrighted broadcast programming.[6] That is precisely

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[3] *See id.* § 106(3).

[4] *See* U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmissions of Broadcast Signals* (Aug. 1, 1997) [hereinafter "*Copyright Office Report*"], at 13 ("A compulsory license mechanism is in derogation of the rights of authors and copyright owners." (internal quotation marks and citation omitted)).

[5] *Fame Publ'g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir.), *cert. denied*, 423 U.S. 841 (1975).

[6] *See Copyright Office Report* at 102 ("It is important to note, however, that the copyright law does not prohibit a satellite carrier from providing network service to a subscriber who does not reside in an unserved household. Rather, the satellite carrier simply cannot make use of the compulsory license in this circumstance, and must negotiate privately with the copyright owners of the programming appearing on the network signals being retransmitted. The Copyright Office is not aware, however, of any satellite carriers or copyright owners that have attempted to negotiate such rights.").

what the broadcast networks and their local affiliates must do to secure the rights necessary to broadcast programming material they do not create. Local broadcast stations do not have the benefit of a compulsory license scheme. Local stations, for example, are not able to rebroadcast the other television programs offered by EchoStar, the National Rural Telecommunications Cooperative ("NRTC"), DirecTV, or PrimeTime 24—such as ESPN, CNN, HBO, or Nickelodeon—without securing consent from the underlying holder of the copyrights for those programs.

The Commission has not been granted authority either to administer or enforce the copyright laws, including the SHVA, and, absent express congressional authority, the Commission—not being the agency charged with administration of the copyright laws—has no authority to interpret, enforce, preempt, or abrogate those laws. Although the Commission may have specialized knowledge concerning certain matters that are referenced in the Act, most notably, in the context of this rulemaking, the construct of the term "Grade B intensity," the Commission does not have authority to construe that construct for purposes of the Act in a way that is inconsistent with the underlying goals, objectives, and intent of the Act.

Courts have ruled repeatedly that the Commission lacks authority to interfere with copyrights. For example, the Second Circuit has stated that because the Communications Act "lacks a comprehensive scheme of regulatory powers and private remedies, [it] was not intended to preempt the application of the Copyright Act."[7] Moreover, the Commission itself has conceded as much: "[W]e do not have jurisdiction with regard to matters of pure copyright . . . ."[8] Most significantly,

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[7] *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872 (2d Cir. 1967) , *rev'd on other grounds*, 392 U.S. 390 (1968).

[8] Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, *Report*, FCC 87-62, 62 Rad. Reg. 2d (P & F) 687 (1987), (continued...)

members of Congress recognize that the Commission cannot act with respect to the Act as currently codified. The *Notice* seems to find weight in letters of Senator McCain and Representative Boucher to Chairman Kennard. In particular, the *Notice* quotes Congressman Boucher's letter as stating that "'the Commission was specifically authorized by Congress to define "Grade B" for purposes of the Act.'"[9] However, whatever these *informal* letters appear to say, the *formal* actions of Senator McCain and Congressman Boucher in Congress, *subsequent* to these letters, demonstrate a recognition by them that Congress—not a few members of Congress—must specifically authorize the Commission to redefine the definition of "unserved household." Thus, on September 17, 1998, Senator McCain introduced a bill that expressly authorized the Commission "to complete a single rulemaking proceeding in which it shall rule on any petitions or similar matters regarding the definition of unserved areas or households,"[10] and on October 1, 1998, Congressman Boucher co-sponsored a bill to the exact same effect.[11] These bills were not enacted. They are not the law. The *Act* is the *law*, and, quite simply, the Act does not repose any statutory authority in the Commission to modify the intellectual property rights of the creators of television programming or their licensees.

(...continued)
¶ 209 n.252; *see also* Program Exclusivity in the Cable and Broadcast Industries, *Report and Order*, FCC 88-180, 64 Rad. Reg. 2d (P & F) 1818 (1988), ¶ 130 (stating that the Copyright Act forecloses Commission rules "that fundamentally change the compulsory license scheme"); Restrictions on Use of Microwave Relay Facilities to Carry Television Signals to Community Antenna Television Systems, *First Report and Order*, FCC 65-335, 4 Rad. Reg. 2d (P & F) 1725 (1965), ¶¶ 55 n.32, 159 (noting that copyright matters are beyond the Commission's jurisdiction).

[9] *Notice* ¶ 13.

[10] S. 2494, 105th Cong., § 5(c) (1998).

[11] *See* H.R. 4675, 105th Cong., tit. I, § 103(c) (1998).

Moreover, it would be presumptuous in the extreme for the Commission to "assume" Congress did not know what it was doing when it adopted the Grade B signal standard. Clearly, had Congress intended to create a larger geographical "white area" area for the satellite industry, it would have done so by specifying something less than the Grade B signal standard. Congress could have, in 1988, adopted any of the various proposals and concepts the Commission referenced in its *Notice*—but it did not. Congress has since held extensive hearings regarding the Act and has not modified the Act's "unserved household" definition. The relevant House Subcommittee and Senate Committee with jurisdiction over copyright law held hearings regarding the "white area" and "unserved household" provisions in 1994 when it renewed the Act and again earlier this year. Despite extensive examination of the "white area" provision, Congress has not enacted legislation to redefine the Grade B standard or to diminish or weaken it in any way—nor has Congress instructed nor authorized the Commission to do so.

The Commission, therefore, is without authority to modify the definition of an "unserved household" by substituting, as petitioners request, a predictive signal standard for the actual signal measurement test mandated by the Act. Nor may the Commission create "presumptive" standards, as petitioners propose, about where levels of local service are "presumed" to exist. Nor may the Commission manipulate by redefining, as EchoStar requests, the signal intensity levels required by the Act for a signal of Grade B intensity. Nor may the Commission take the other actions requested by petitioners that would shrink the geographical area of copyright protection Congress prescribed in the Act for broadcast networks and their local affiliates.

And, finally, any action taken or recommendations made by the Commission must be narrowly tailored and consistent with the stated policy objectives and goals of the Act.

Therefore, notwithstanding recent letters from influential members of Congress, the

thousands of angry letters and e-mails from frustrated and defrauded consumers, and the desire of both the Commission and Congress to facilitate competition to cable, the Commission's ability to act in this proceeding is circumscribed by the terms of the Act and its legislative purposes, objectives, and intent.

III.
The Act Had A Dual Legislative Purpose

As the Commission recognizes in its *Notice*, the Act had a dual purpose: (1) to enable households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) to protect the integrity of the copyrights that make possible the existing free, over-the-air national network/local affiliate broadcast distribution system.[12]

The Act represents a careful balance between the public interest, on the one hand, in allowing households located beyond the reach of a local network station to secure access to broadcast network programming and, on the other hand, in preserving "localism" by protecting the copyrights each local network station has for the broadcast of its network programming in its local market. The Act was designed to protect the exclusivity of the copyright held by each affiliate for exhibition in its market of its network programming.[13] At the heart of the Act was an acknowledgment by Congress of the national interest in preserving "local" broadcast service by protecting the longstanding, *free*, universally-available, over-the-air national network/local affiliate television distribution system—a

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[12] *See Notice* ¶ 36; H.R. Rep. No. 100-887, pt. 1, at 8 (1988).

[13] *See* H.R. Rep. No. 100-887, pt. 2, at 20 (1988); H.R. Rep. No. 100-887, pt. 1, at 14 (1988); H.R. Rep. No. 100-887, pt. 2, at 19-20 (1988).

system Congress acknowledged "has served the country well."[14] Localism is a bedrock principle of the nation's broadcast television system. "[T]he Commission historically has followed a policy of 'localism' as a sound means of promoting the statutory goal of efficient public service."[15] Indeed, the Commission has acknowledged that "our commercial television system is based upon the distribution of programs to the public through a multiplicity of local station outlets. [W]e have not turned to an alternative system of signal and program distribution, based upon a handful of 'super stations.'"[16]

Congress recognized that an important public interest distinction between the services offered by satellite carriers and those offered by local affiliates is that satellite services are available only to those who can afford to *pay* for them while broadcast services provided by local affiliates are *free* for everyone.[17] Accordingly, the assurance of continued access by the public to the nation's *free, universally-available, local* broadcast service was a core policy objective of the Act. As the Commission, itself, stated in the *Notice*, "We acknowledge and reiterate Congress' decision in the SHVA to protect network-affiliate relationships and to foster localism in broadcasting."[18] Accordingly, any action taken by the Commission in this proceeding must be consistent with these underlying policy objectives of the Act.

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[14] H.R. Rep. No. 100-887, pt. 2, at 20 (1988).

[15] *National Ass'n of Broadcasters v. FCC*, 740 F. 2d 1190, 1198 (D.C. Cir. 1984).

[16] Restrictions on Use of Microwave Relay Facilities to Carry Television Signals to Community Antenna Television Systems, *First Report and Order*, FCC 65-335, 4 Rad. Reg. 2d (P & F) 1725 (1965), ¶ 47.

[17] *See* H.R. Rep. No. 100-887, pt. 1, at 26 (1988).

[18] *Notice* ¶ 36.

The Act gives satellite carriers an extraordinary privilege—a compulsory copyright license that allows satellite carriers to uplink a distant network television station and retransmit the station's programming to "unserved households" without securing the station's consent and without purchasing in the open market the underlying copyrights for the station's programming. The Act defines an "unserved household" with respect to a particular network station as a household that

> (A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and
>
> (B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.[19]

The legislative history of the 1988 Act and its 1994 renewal are replete with expressions by members of Congress that the Act was designed, primarily, to provide broadcast network service to rural areas:

> [The bill] will benefit *rural America*, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.[20]
>
> The extension of the SHVA "ensure[s] that *rural home satellite dish consumers* will be able to continue to receive retransmitted broadcast programming. This is essential because in many rural areas satellite technologies represent the only way that *rural families* can receive the kind of information and entertainment programming that many urban Americans take for granted."[21]

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[19] 17 U.S.C. § 119(d)(10).

[20] H.R. Rep. No. 100-887, pt. 1, at 15 (1988) (emphasis added).

[21] 140 Cong. Rec. E1770 (daily ed. Aug. 19, 1994) (statement of Rep. Long) (emphases (continued...)

> The extension of the SHVA is needed "to ensure that *rural consumers* will continue to receive television programming."[22]

It is indisputable that the core subscriber base of EchoStar, DirecTV, and other satellite carriers is not located in *rural* areas. Indeed, *rural* customers are the exception—rather than the rule—among the four million households that currently subscribe to one or more of the broadcast network satellite services.

It is also clear from the Act's legislative history that Congress, the Copyright Office, the satellite industry, and this Commission believed that the special copyright privilege afforded to satellite carriers would result in broadcast satellite service being provided only to a *small number* of households. The House Report accompanying the Act noted that Congress was willing to create the statute in derogation of fundamental copyright principles because only a small number of homes would ever qualify for the compulsory license. The House Report noted only a "*small percentage* of television households cannot now receive a clear signal of the . . . national television networks."[23] The Honorable Ralph Oman, the then Register of Copyrights, noted that only a "relatively *small number* of viewers would qualify under the Act for satellite delivery of broadcast network programming."[24] Over-the-air network penetration in 1987 was 98.1% of all television households,

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(...continued)
added).

[22] 140 Cong. Rec. H9268, H9270 (daily ed. Sept. 20, 1994) (statement of Rep. Hughes) (emphasis added).

[23] H.R. Rep. No. 100-887, pt. 2, at 19 (1988) (emphasis added); *see also* H.R. Rep. No. 100-887, pt. 1, at 15, 19 (1988); 140 Cong. Rec. E1770 (daily ed. Aug. 19, 1994) (statement of Rep. Long); 140 Cong. Rec. H9268, H9270 (daily ed. Sept. 20, 1994) (statement of Rep. Hughes)

[24] *Hearing Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary*, 100th Cong. (Jan. 27, 1988) (statement of Ralph Oman) (continued...)

and the Commission estimated then that fewer than 500,000 households would qualify for the license—a number the Commission termed "not substantial upon a nationwide basis."[25] And both SBN (the predecessor of PrimeTime 24) and Netlink told the Commission in 1988 that only one million households would be eligible to receive their service.[26]

Already "not substantial" in 1987, the "white area" problem has steadily diminished over the years. There were 1,028 commercial television stations on the air in 1988; today, there are 1,216.[27] In addition, since 1994 alone, when Congress renewed the Act, the number of television translators has increased by 142.[28] Moreover, television transmitters, receivers, and antennas have continued to improve. Television receivers can pick up an acceptable quality picture today at greater distances from transmitter sites than ever before. While the total number of television households has

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(...continued)
(emphasis added).

[25] Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, *Report*, FCC 87-62, 62 Rad. Reg. 2d (P & F) 687 (1987), ¶ 198. The following year, summarizing data collected by the industry, the Commission stated that "the consensus appears to be that 800,000 households to 1 million households are in [white] areas" and noted that "[t]his is roughly equivalent to one percent of television households." Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, *Report and Order*, FCC 88-67, 64 Rad. Reg. 2d (P & F) 910 (1988), ¶ 64 n.41.

[26] *See* Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, *Report and Order*, FCC 88-67, 64 Rad. Reg. 2d (P & F) 910 (1988), ¶ 64 n.41.

[27] *See* 66 Television and Cable Factbook at I-45 (1998); *Broadcast Station Totals as of October 30, 1998* (released Nov. 18, 1998).

[28] *Compare Broadcast Station Totals as of October 30, 1998* (released Nov. 18, 1998) (indicating there are currently 4934 VHF and UHF translators) *with Broadcast Station Totals as of February 28, 1994* (released Mar. 11, 1994) (indicating there were 4792 VHF and UHF translators at that time). The Affiliate Associations were unable to obtain 1988 data for the number of television translators.

increased since 1988, the coverage by local stations has as well. Given the increase in the number of stations and translators and improvements in television transmitting and receiving equipment, we believe "white area" reception difficulties today are likely to be experienced by fewer than 0.5% of all television households or fewer than 500,000 households—not "millions" of households as the satellite carriers fallaciously assert.

IV.
The History Of The Marketing And Selling Of Broadcast Signals By The Satellite Industry Is A History Of Misrepresentation, Deception, And Fraud

Hardly had the ink dried on the 1988 Act when local broadcasters began to realize that satellite carriers were exceeding the limits of their compulsory license and infringing the copyrights of local affiliates on a massive scale. Satellite carriers were marketing and selling distant broadcast network stations indiscriminately to dish owners who could easily receive the same network from a local affiliate. The four maps attached as Exhibit 2 demonstrate the extent to which satellite carriers have ignored the limits of their statutory copyright. The black dots on these maps depict PrimeTime 24 subscribers signed up between January 1, 1996, and January 17, 1997. (These subscribers are customers of DirecTV.) Virtually all of the new subscribers are located within each local station's Grade B service area as predicted by the standard Longley-Rice model, with the largest percentage, by far, located within each station's predicted Grade A service area. For example, during the period covered by the maps, PrimeTime 24 signed up 6655 subscribers residing within the predicted Grade B service area of KRIV-TV, Houston, Texas. Of these 6655 subscribers, 6393—an incredible *96%*—reside within the station's predicted *Grade A* service area. Similarly, of the subscribers signed up by PrimeTime 24, *91%*, *86%*, and *89%* are located within the predicted

Grade A service areas of stations KTVT-TV, Fort Worth, Texas, WSVN-TV, Miami, Florida, and WGNX-TV, Atlanta, Georgia, respectively. These stations are not located in areas of difficult or hilly terrain. There are no terrain impairments here to good reception of these stations. These maps confirm what broadcasters have been saying for years: The satellite carriers will sign up anybody, anywhere, who asks for the service.

This conclusion is further confirmed by signal intensity tests that broadcasters conducted at 500 randomly selected households served by PrimeTime 24 in five different markets. The results of these tests are telling: in Miami, 100% of the households tested were found to be illegally served and the percentages of illegally-served households in Charlotte, Baltimore, Pittsburgh, and Raleigh were 98%, 91%, 59%, and 95%, respectively.[29] The satellite industry cannot now hide from its shameful record—a record characterized by an arrogant and gross indifference to the law.

Congress, from the outset, encouraged broadcasters and satellite companies to try to work cooperatively to implement the Act. In keeping with that request, the ABC, CBS, and NBC Television Affiliate Associations and their networks participated, in good faith, in countless negotiations with satellite carriers after the Act became law in an effort to establish a voluntary inter-industry compliance and enforcement program. These affiliates and their networks pursued negotiations with the satellite industry for several years in the hope that agreement might eventually be reached on a compliance and enforcement program. From the very beginning, the broadcasters urged and pleaded with the satellite carriers not to misrepresent to innocent consumers the nature and scope of the copyright license the satellite carriers hold for delivery of broadcast network programming. Those requests were ignored.

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[29] The results of these tests have been previously provided to the Commission.

A comprehensive compliance and settlement agreement was finally reached with two satellite carriers (PrimeStar and Netlink) earlier this year. Regrettably, EchoStar, DirecTV, PrimeTime 24, and NRTC refused to sign the agreement.

The history of the marketing and selling of broadcast signals by the satellite industry is a history of misrepresentation, deception, and fraud. The deceptive advertising and marketing practices of satellite carriers PrimeTime 24 and EchoStar have been particularly egregious. PrimeTime 24 has for years marketed its broadcast network service—not as a supplemental service for "unserved households" as the Act requires—but rather as a broadcast network "time shifting" and "out-of-market" sports programming service. PrimeTime 24's advertisements for satellite service have for years marketed "time shifting" of broadcast network programming and the availability of "out-of-market" sports programs[30]:

> All the football you need is on PrimeTime 24 . . . over 100 games on PT East, PT West and Fox . . . the only place you can get all 10 playoff games . . . plus your favorite network programs from 7 major cities . . . PrimeTime 24—Your network and football connection.
>
> [PrimeTime 24 ad]
>
> * * *
>
> Do your customers know they can get the networks on their DBS system?
>
> [PrimeTime 24 ad]
>
> * * *

[30] The full text of these advertisements is contained in Exhibit 3.

> With PrimeTime 24's network affiliates, your DBS customers won't miss one minute of their favorite prime time programs, daytime soaps, evening news and seasonable sports on East and West Coast feeds.
>
> [PrimeTime 24 ad]

In all of these ads, disclosure of the Act's "unserved household" restriction is relegated to small print, hardly discernable without magnification. Similarly, print ads that EchoStar is currently publishing in major newspapers across the country bury the "unserved household" restriction at the bottom of the page in minuscule print that is unreadable for most without a magnifying glass.[31]

Consumers have been deceived by countless advertisements like these and by the failure of satellite companies and their agents and distributors to disclose fully and conspicuously the Act's "unserved household" restrictions. As the Copyright Office acknowledged in a 1997 Report to Congress:

> Satellite carriers and particularly the distributors have directly contributed to this [consumer] confusion, especially after they have signed up a potential customer for satellite network service. Much of this confusion could have been avoided if satellite carriers were required to disclose the provisions of the unserved household restriction *before* they provided a subscriber with satellite service.[32]

If consumers are frustrated (and they have good reason to be), it is because satellite carriers and those acting on their behalf have failed to disclose truthfully and honestly the limits of their compulsory copyright license. Satellite carriers have, instead, tricked and misled millions of innocent consumers into signing up for a service the satellite carriers knew they did not have a copyright license to provide.

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[31] The full text of this advertisement is contained in Exhibit 4.

[32] *Copyright Office Report* at 123 (emphasis in original).

A federal district court recently observed that PrimeTime 24 has been "grossly negligent" in complying with the Act, stating

> Although PrimeTime 24 knew of the governing legal standard, it nevertheless chose to adopt one it found more convenient. PrimeTime was broadcasting network programming to thousand[s] of subscribers who received a signal of Grade B intensity as defined by Congress. PrimeTime has simply ignored the Grade B test even though it tried and failed to persuade Congress to adopt a test of eligibility based upon subscriber declarations about over-the-air reception. "A good faith belief as to what the law should be, or what you want the law to be, is not enough." The court therefore finds that there is no material dispute that PrimeTime's transmissions to ineligible households were grossly negligent and "repeated."[33]

The level of fraud and deception practiced by the satellite industry is unprecedented within the television industry. The Affiliate Associations respectfully request the Commission, in the exercise of its public interest oversight, to take immediate action to end the scam. The Commission should recommend to Congress that the Act be amended to require satellite carriers to disclose in conspicuous, bold type in all print and video ads and to state in all audio ads and sales presentations the limitations on their copyright license to provide broadcast network programming—or the Commission should institute license revocation proceedings against satellite carriers that engage in deceptive, unlawful, and unfair trade and marketing practices.

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[33] *ABC, Inc. v. PrimeTime 24, Joint Venture*, 17 F. Supp. 2d 467, 476 (M.D.N.C. 1998) [hereinafter "*ABC* First Order"] (quoting *Columbia Pictures Indus., Inc. v. Liberty Cable, Inc.* 919 F. Supp. 685, 690 (S.D.N.Y. 1996)).

V.
The Federal District Court Decisions Interpreting The Act Are Entirely Consistent

Having tolerated the fraud and infringement of their copyrights for years and having spent years in fruitless and frustrating negotiation, the national broadcast networks and local network affiliates eventually began to file copyright infringement actions against the largest satellite provider of broadcast network programming, PrimeTime 24. PrimeTime 24 provides a broadcast network program service to DirecTV and NRTC and, until recently, to EchoStar. Infringement actions were filed in Miami, Florida, Amarillo, Texas, and Greensboro, North Carolina. Last month, the four major networks and their affiliates filed an infringement action in Miami against EchoStar.

In *CBS, Inc. v. PrimeTime 24 Joint Venture*, the United States District Court for the Southern District of Florida (the "Miami court") recently issued a *preliminary* injunction prohibiting PrimeTime 24 from retransmitting CBS and Fox Network programming to any household within areas shown on Longley-Rice propagation maps that are predicted to receive a signal of at least Grade B intensity from a local CBS or Fox affiliate without either (1) obtaining the written consent of the affiliate and the network or (2) providing the affiliate with the results of a signal strength test of the subscriber's household that establishes it cannot receive from the affiliate a signal of Grade B intensity.[34] The injunction was issued based on findings by the Miami court that PrimeTime 24 has "willfully and repeatedly rebroadcast copyrighted network programming to served households in violation of SHVA."[35]

In *ABC, Inc. v. PrimeTime 24*, a North Carolina federal district court (the "North Carolina

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[34] *See CBS, Inc. v. PrimeTime 24 Joint Venture*, 9 F. Supp. 2d 1333, 1347 (S.D. Fla. 1998).

[35] *Id.* at 1344.

court") recently granted summary judgment in favor of ABC's station WTVD-TV, Durham, North Carolina, and found from "a *mountain of evidence*" that PrimeTime 24 had engaged in a "*pattern and practice*" of copyright infringements and had committed "*willful or repeated*" violations of the Act.[36] The North Carolina court, as the Act requires upon such findings, issued a *permanent* injunction revoking PrimeTime 24's statutory compulsory license and prohibiting PrimeTime 24 from retransmitting ABC network programming to *any* household—served or unserved—within WTVD's local market.[37] In short, finding that PrimeTime 24 had abused its statutory copyright license on a massive scale, the North Carolina court permanently revoked PrimeTime 24's compulsory license.

EchoStar and NRTC—both of whom should know better—have misrepresented to the Commission the holdings of the Miami and North Carolina courts. They claim the Commission must take action because the Miami and North Carolina courts have misconstrued the Commission's Grade B standard and have interpreted the Act in disparate ways. For example, EchoStar states that "the very notion that two District Courts could issue such different orders attempting to read what the Commission has or would have said on the Grade B issue underlines the need for the Commission to interpret Grade B intensity."[38] That is not a fair or accurate characterization of the holdings in these two decisions. The holdings of the Miami and North Carolina courts are not at

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[36] *ABC* First Order at 476-77 (emphases added); *see also ABC, Inc. v. PrimeTime 24 Joint Venture*, 17 F. Supp. 2d 478 (M.D.N.C. 1998) [hereinafter "*ABC* Second Order"].

[37] *See ABC* Second Order, 17 F. Supp. 2d at 490.

[38] Petition for Declaratory Ruling and Rulemaking with Respect to Defining, Predicting and Measuring "Grade B Intensity" for Purposes of the Satellite Home Viewer Act, *Petition for Declaratory Ruling and/or Rulemaking of EchoStar Communications Corporation*, RM No. 9345, (dated Aug. 18, 1998) [hereinafter "EchoStar Petition"], at 6-7 (emphasis omitted).

odds, and they do not misconstrue the Act nor the Commission's Grade B signal intensity standard. Both courts held that the phrase "signal of Grade B intensity," as used in the Act, refers to measured signal intensity as set forth in the Commission's rules at 47 C.F.R. § 73.683(a).[39]

Here are the true facts. The plaintiffs in the Miami case alleged "individual" violations of the Act and requested injunctive relief to prohibit PrimeTime 24 from serving homes that can actually receive (as confirmed by a signal measurement test) a signal of Grade B intensity from a local affiliate of the relevant network. The plaintiffs did not ask the Miami court to revoke PrimeTime 24's compulsory license. In fact, to assist PrimeTime 24 in complying with the Act—and to *lessen* PrimeTime 24's signal testing burden—the plaintiffs recommended and the Miami court agreed to employ Longley-Rice maps to create a *presumption* of where local signals can and cannot be received. In fact, EchoStar has stated that it "agrees that the [Miami] court employed the broadcaster-proposed predictive model as a presumption."[40] By the terms of the Miami court's order, that presumption can be rebutted with an actual signal measurement at each household. Thus, if PrimeTime 24 can show by actual signal measurement that a subscriber whose service is "presumed" to be in violation of the Act, and thus must be terminated, cannot, in fact, receive a Grade B signal from a local affiliate, then PrimeTime 24 is not required to terminate service to that subscriber. If PrimeTime 24's compliance with the Act is as pristine as EchoStar, NRTC, and others in the satellite industry now claim, then *few, if any, subscribers will have their satellite delivery of broadcast programming terminated by the Miami court's injunction*!

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[39] *See CBS*, 9 F. Supp. 2d at 1340; *ABC* First Order, 17 F. Supp. 2d at 472.

[40] Petition for Declaratory Ruling and Rulemaking with Respect to Defining, Predicting and Measuring "Grade B Intensity" for Purpose of the Satellite Home Viewer Act, *Reply of EchoStar Communications Corp.*, RM No. 9345 (dated Oct. 13, 1998) [hereinafter "EchoStar Reply"], at iii.

PrimeTime 24 has had six months from the date of the Miami court's order in which to conduct these tests, and, by agreement, the plaintiffs have since extended that date until February 28, 1999. In fact, PrimeTime 24 has had *years* (from the date service was first begun to these subscribers) in which to determine the eligibility of its subscribers, and, during all that time, it has conducted only a handful of signal measurement tests. The so-called "crisis" precipitated by the Miami court decision and of which the satellite industry now complains is self-inflicted. The "train wreck" to which Chairman Kennard has publicly referred is one created by the satellite industry itself—and it results from the satellite industry's gross indifference to the law. That indifference has been grounded in the apparent belief by the satellite industry that if the Act were violated on a sufficiently large scale, Congress, the Commission, and others in Washington would ultimately come to its aid and rescue the industry from its unlawful conduct.

Unlike the plaintiffs in the Miami case, the plaintiff in the North Carolina case alleged that PrimeTime 24 had engaged in a "pattern or practice" of violations (in addition to "individual" violations) and requested—and the district court granted—a permanent injunction *revoking PrimeTime 24's compulsory* license to deliver ABC network programming in the Raleigh-Durham market. It is clear from the terms of the Act that Congress intended for the courts to deal harshly with satellite carriers that violated the limits of their compulsory copyright license on a massive scale, and Congress, therefore, *mandated* that courts revoke a satellite carrier's compulsory license (as the Commission is authorized to do in cases involving its licensees) when the holder of the license has been found to have engaged in a "pattern or practice" of violations.[41] Revocation of PrimeTime 24's compulsory license was mandatory, not discretionary, and the North Carolina court

[41] *See* 17 U.S.C. § 119(a)(5)(B)(ii).

did precisely what Congress required of it. Accordingly, the North Carolina court had neither the occasion nor need to employ Longley-Rice maps for purposes of enforcing its injunction.

In short, the decisions of the Miami and North Carolina courts are consistent in every respect. Each decision reflects a correct application of the law to the facts in each case and an appropriate grant of the relief requested by the plaintiffs.

VI.
The NRTC And EchoStar Petitions

With its fraud having been exposed, the satellite industry launched last year a Washington lobbying blitz and is now asking the Commission to do what Congress, itself, has refused to do—rewrite the Act and rescue the industry from its lawless conduct. On July 8, 1998, NRTC filed an Emergency Petition for Rulemaking asking the Commission to redefine "Grade B," for purposes of interpreting the Act, "as a contour encompassing a geographic area in which 100 percent of the population, using readily available, affordable equipment, receives over-the-air coverage by network affiliates 100 percent of the time."[42] On August 18, 1998, EchoStar filed a Petition for Declaratory Ruling and/or Rulemaking asking the Commission, in "the long term," to redefine its Grade B signal intensity measurements and, in the short term, to adopt a predictive standard that would allow satellite carriers to provide distant network signals via satellite without conducting actual signal measurement tests.[43] EchoStar proposes a new and untested "model that predicts the outermost boundary at which 99% of households receive a Grade B signal 99% of the time with 99%

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[42] Definition of an Over-the-Air Signal of Grade B Intensity for Purposes of the Satellite Home Viewer Act, *Emergency Petition for Rulemaking of the National Rural Telecommunications Cooperative*, RM No. 9335 (dated July 8, 1998) [hereinafter "NRTC Petition"], at iii.

[43] *See* EchoStar Petition at vi.

confidence."[44] In addition, EchoStar has requested the Commission to develop a new methodology for measuring whether a household receives a signal of Grade B intensity.[45] As part of its proposed signal measurement methodology, EchoStar proposes to have measurements taken indoors—rather than outdoors on the rooftop as the Act expressly requires—and with the antenna aimed away from—rather than at—the station whose signal is being tested.

Both NRTC's and EchoStar's interests are aligned with PrimeTime 24. NRTC distributes the satellite service furnished by DirecTV, which, in turn, retransmits various broadcast network program packages provided to it by PrimeTime 24. Accordingly, NRTC's broadcast service is tied to PrimeTime 24. As noted earlier, until recently, EchoStar also retransmitted various network program packages provided to it by PrimeTime 24. Although EchoStar has severed its relationship with PrimeTime 24, it continues to violate the Act.

VII.
EchoStar Has Made Contradictory Assertions About The Act In Different Federal Forums— Its Credibility Is Impugned

This proceeding is not the only instance in which EchoStar has sought a reinterpretation of the Act's "unserved household" term. On October 19, 1998, EchoStar also filed a lawsuit in federal district court in Colorado (the "Colorado court") seeking a declaratory ruling regarding the meaning of the Act's "unserved household" restriction.[46] In addition, earlier this year, EchoStar participated

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[44] *Id.* at 29.

[45] *See id.* at 28-30.

[46] *See EchoStar Communications Corp. v. CBS Broadcasting, Inc.*, Plaintiff's Original Complaint and Request for Declaratory Judgment, Civ. Action No. 98-B-2285 (D. Colo. filed Oct. (continued...)

in a proceeding before the Copyright Office in which it asked that Office to interpret the Act's "unserved household" restriction.[47] In each of these three proceedings, EchoStar separately told this Commission, the Colorado court, and the Copyright Office that that forum is uniquely qualified to interpret the Act's "unserved household" term. Moreover, the interpretations EchoStar has recommended to this Commission, to the Colorado court, and to the Copyright Office are inconsistent with and, in fact, contradict each other.

In its complaint, EchoStar asks the Colorado court to adopt a predictive model to allow satellite carriers to provide network service without conducting actual signal measurement tests and to create a new methodology for measuring whether a household can receive a signal of Grade B intensity.[48] The filing of this lawsuit, however, directly contradicts EchoStar's earlier statements to this Commission that these issues are "within [the Commission's] unique area of expertise" and should not "be decided by a body that lacks this expertise—[a] federal court."[49] In addition, EchoStar's request for a declaratory ruling from the Colorado court flatly contradicts the claim it has made in this proceeding that "a court . . . cannot be expected to 'establish telecommunications policy.'"[50]

(...continued)
19, 1998) [hereinafter "EchoStar Complaint"].

[47] *See* Satellite Carrier Compulsory License; Definition of Unserved Household, *Reply Comments of EchoStar Communications*, Docket No. RM 98-1 (U.S. Copyright Office) (dated Mar. 27, 1998) [hereinafter "EchoStar Copyright Reply"].

[48] *See* EchoStar Complaint ¶¶ 37, 58.

[49] *See* EchoStar Reply at i.

[50] *Id.* at iii (quoting Letter from Honorable Rick Boucher et al. to Chairman William Kennard (Aug. 7, 1998)).

EchoStar further contradicts itself by requesting the Colorado court to interpret the Act in a way that differs from the interpretation it proposes to this Commission. EchoStar told the Commission that "[g]iven the importance of ensuring that all Americans have access to network programming with an adequate signal, EchoStar believes that a 99-99-99 model (i.e., a model that predicts the outermost boundary at which 99% of households receive a signal of Grade B intensity 99% of the time with 99% confidence) would be appropriate."[51] Moreover, in its filings with the Commission, EchoStar criticizes the Longley-Rice model used by the Miami court:

> For Longley-Rice maps "[t]he percent confidence factor is set at 50% indicating that [the Commission] is interested in median situations." . . . A 50% confidence factor means that, of every 100 measurements of the signal intensity that a given household at the contour receives at a given time, 50 will likely be below Grade B intensity. In other words, whether the household receives an adequate signal, even at a given time, is literally a toss of a coin. The Commission should seek to moderate this problem by setting the confidence factor higher than the unacceptably low 50%.[52]

However, EchoStar has asked the Colorado court to adopt "a method of predicting the Grade B contour set so that 95% of the locations can receive a Grade B signal 95% of the time with a 50% confidence level."[53] Thus, in a matter of two months, EchoStar has abandoned its 99% confidence factor and has decided that a 50% confidence factor (which it told this Commission was "unacceptably low") is, after all, an appropriate confidence factor for Longley-Rice maps.

In addition, EchoStar also recommends to the Colorado court a different measurement methodology than it has recommended to the Commission. EchoStar suggests to the Commission

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[51] EchoStar Petition at 29.

[52] *Id.* at 24.

[53] EchoStar Complaint ¶ 57.

that individual household measurements be taken (presumably inside) at a subscriber's television set using the subscriber's own antenna and cable.[54] However, in its Colorado complaint, EchoStar proposes that measurements be taken *outdoors* "as close to the house as possible" using standard equipment.[55]

Moreover, EchoStar's statements to this Commission are also at odds with statements it made earlier this year in a proceeding before the Copyright Office. EchoStar is arguing to this Commission that the "unserved household" restriction should be interpreted to allow satellite carriers to retransmit distant network signals to more Americans. However, EchoStar argued just the opposite before the Copyright Office. There, EchoStar told the Copyright Office that "*the [unserved household] provision was meant to prevent distant signal importation.*"[56] In addition, while EchoStar told this Commission the Act was enacted to ensure network service for as many people as possible,[57] EchoStar told the Copyright Office:

> [T]he *only* reason why Congress imposed the "unserved household" restriction was its sensitivity to a concern expressed by networks and network affiliates: that the importation of distant network signals into markets served by the local affiliate of the same network would disrupt the network-affiliate relationship and threaten the local affiliate's revenues.[58]

Other than not wanting to comply with the Act, EchoStar, plainly, does not know what it wants. EchoStar's inconsistent and contradictory assertions impugn its credibility and undermine the

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[54] *See* EchoStar Reply at 16.

[55] *See* EchoStar Complaint ¶¶ 34, 37.

[56] EchoStar Copyright Reply at 38 (emphasis added).

[57] *See* EchoStar Petition at 20.

[58] EchoStar Copyright Reply at 2 (emphasis added).

arguments it is making to the Commission. EchoStar either doesn't know what it is saying in different federal forums, or doesn't care, or is consciously making contradictory assertions in the hope it will not be caught.

VIII.
The Commission Cannot And Should Not Manipulate Grade B Signal Intensity Levels To Weaken The Copyright Protections Of The Act

In the *Notice*, the Commission inquires whether it has authority to redefine the term "a signal of Grade B intensity" solely for purposes of the Act.[59] When Congress incorporated the "Grade B intensity" standard into the Act, it adopted, for purposes of the Act, the Commission's then-existing definition of the term. Congress understood that the Commission had no authority to administer, interpret, or enforce the Act and, obviously, did not contemplate that the Commission would, unilaterally, revise the term. Had Congress desired for the Commission to redefine the term, it would have either authorized or directed the Commission to institute a rulemaking proceeding for that purpose. It is also clear from the text of the Act and its legislative history that Congress intended to adopt the Commission's rules as they existed at that time.

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[59] *Notice* ¶¶ 20-22. Nowhere in its Petition does NRTC suggest that the Commission should revise its "Grade B intensity" levels. Rather, NRTC asks that the Commission redefine the term "Grade B intensity" by engrafting a predictive standard onto the Act. *See* NRTC Petition at 16-18. Similarly, EchoStar's Petition also focuses on asking the Commission to create a predictive model that can be used to enforce the Act and a new methodology for measuring signal intensity. Almost as an afterthought, EchoStar suggests in a footnote that "[t]he Commission also has the power to revise its numerical definition of Grade B intensity." EchoStar Petition at iii n.3. However, even EchoStar acknowledges that "the redefinition of 'Grade B intensity' for SHVA or any other purposes may require careful, fully informed and elaborate analysis" and, accordingly, only asks for such relief "long term." *Id.* The fact that the satellite carriers did not envision, let alone recommend, that the Commission revise these complex, carefully-crafted, and long-standing signal intensity values in an expedited rulemaking proceeding demonstrates the inappropriateness of the attempt.

Even if it could, there is absolutely no reason for the Commission to redefine Grade B signal intensity levels. That current signal intensity levels ensure reception of an acceptable picture is confirmed by the Commission's recent decision to allocate new DTV channels on the basis of replicating existing Grade B service areas. Moreover, any change to the Grade B levels would have a detrimental impact on other Commission policies and would create administrative inefficiencies. Furthermore, the Affiliate Associations assert that if the Grade B intensity levels are to be changed at all, they should be revised downward, not upward.

A. The Commission Cannot Redefine Grade B Intensity Levels For Purposes Of The Act

The Commission cannot redefine Grade B signal intensity levels for purposes of the Act. Congress has not delegated authority to the Commission to administer, interpret, or enforce the nation's copyright laws or the Act. Nevertheless, the Commission has tentatively concluded that it has authority to revise the Act based on the phrase "a signal of Grade B intensity (as defined by the Federal Communications Commission)." We are not aware of any instance where Congress has given an agency authority to interpret a statute that Congress did not authorize the agency to administer. In fact, courts have repeatedly held that the basis of any court's deference to an agency's administrative interpretation of a statute is the agency's familiarity with and expertise concerning statutes it is entrusted to administer.[60] The Supreme Court has specifically held that a "precondition to deference under *Chevron* is a Congressional delegation of administrative authority."[61] The D.C. Circuit has held that "when an agency interprets a statute other than that which it has been entrusted

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[60] *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1989); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990).

[61] *Adams Fruit Co.*, 494 U.S. at 650.

to administer, its interpretation is not entitled to deference."[62] Similarly, the Third Circuit has also held that "an agency decision is not entitled to . . . deference when it interprets another agency's statute."[63]

Satellite carriers argue that the fact the Commission is not authorized to administer the Act does not preclude the Commission from redefining the "unserved household" definition.[64] EchoStar argues that "the [Act] plainly granted authority to the Commission in a *narrow, specific area*—the critical definition of 'unserved households'—precisely because the Commission (and not the Copyright Office) has 'familiarity with and expertise concerning' broadcast propagation standards."[65] Although Grade B intensity measurements are used by the Commission for communications law purposes, these measurements were incorporated into the Act solely for the purposes of defining the scope of *copyright* protection afforded to local affiliates. The "unserved household" definition is the crux of the Act because that definition determines the geographic scope of the satellite industry's compulsory copyright license. Any change in the definition, and particularly in the "critical" Grade B intensity term, will affect the scope of the copyright license and the copyright protections afforded by the Act. The Commission cannot act here without modifying

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[62] *Department of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). *See also Illinois Nat'l Guard v. FLRA*, 854 F. 2d 1396, 1400 (D.C. Cir. 1988) (same).

[63] *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988). *See also New Jersey Air Nat'l Guard v. FLRA*, 677 F. 2d 276, 286 n.6 (3d Cir.) (same), *cert. denied*, 459 U.S. 988 (1982).

[64] *See* EchoStar Reply at 17; Definition of an Over-the-Air Signal of Grade B Intensity for Purposes of the Satellite Home Viewer Act, *Reply Comments of the National Rural Telecommunications Cooperative*, RM No. 9335 (dated Sept. 21, 1998) [hereinafter "NRTC Reply"], at 15.

[65] *See* EchoStar Reply at 17 (emphasis added).

copyright law—an area in which it has neither expertise nor authority. The Supreme Court has admonished that "'an agency may not bootstrap itself into an area in which it has no jurisdiction.'"[66]

Moreover, as noted earlier, at the request of Senator Hatch, the Copyright Office recently inquired into the scope of the satellite compulsory license and the meaning of the "unserved household" term.[67] Satellite carriers urged the Copyright Office to interpret the term "unserved household" to allow local retransmission of local network signals via satellite.[68] Not once in that proceeding did the Copyright Office, EchoStar, or any other participant suggest that the Commission has the authority to redefine the critical "unserved household" term. In fact, the Copyright Office has specifically recommended to Congress that it amend the Act and has suggested that "the unserved household restriction *be removed from the copyright law and placed in the communications law*."[69] Clearly, the Copyright Office does not believe the Commission has any *existing* authority to interpret the term. This conclusion has been affirmed by both federal courts that have examined the Act. Neither the Miami court nor the North Carolina court has suggested that the Commission has authority to interpret or redefine *any* provision in the Act.[70]

The Act's legislative history confirms that Congress intended to incorporate and adopt the

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[66] *Adams Fruit Co.*, 494 U.S. at 650 (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

[67] *See* EchoStar Copyright Reply at 38.

[68] *See generally id.*

[69] *Copyright Office Report* at 138 (emphasis added). To date, Congress has declined to act on this recommendation.

[70] *See generally CBS, Inc. v. PrimeTime 24 Joint Venture*, 9 F. Supp. 1333 (S.D. Fla. 1998); *ABC* First Order, 17 F. Supp. 467 (M.D.N.C. 1998); *ABC* Second Order, 17 F. Supp. 2d 478 (M.D.N.C. 1998).

Grade B signal intensity standard then existing in the Commission's regulations. A House Energy and Commerce Committee report accompanying the Act defines an "unserved household" as a household that receives, with a conventional outdoor antenna, a "signal of Grade B intensity (as defined by the Commission, *currently* in 47 C.F.R. Section 73.683(a))."[71] The use of the term "currently" confirms that Congress intended to adopt the Commission's definition of Grade B intensity as it existed *at that time.*

In its *Notice*, the Commission states that "[w]hen Congress incorporated Grade B into the definition of 'unserved households' it did not incorporate specific values, such as the dBu levels the Commission uses in Section 73.683."[72] However, Congress can clearly incorporate an administrative regulation by reference to the regulation, and that is exactly what Congress did here. It is a well-established canon of statutory interpretation that "[w]here one statute adopts another by a specific and descriptive reference to the statute or the provisions adopted . . . [s]uch adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications. . . ."[73] Moreover, contrary to arguments erroneously advanced by the satellite carriers, this rule of construction is not limited to situations where a statute references another statute, but it also applies to situations where a statute references an administrative regulation. Thus, it has been held that "[w]hen a statute adopts by specific reference the provisions of another statute, *regulation*,

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[71] H.R. Rep. No. 100-887, pt. 2, at 26 (emphasis added).

[72] *Notice* ¶ 20.

[73] *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (internal quotation marks and citation omitted). *See also Bexar County Criminal District Attorney's Office v. Mayo*, 773 S.W.2d 643, 643-44 (Tex. Ct. App. 1989) (holding that "[w]here one statute incorporates another by reference, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact").

or ordinance, such provisions are incorporated in the form in which they exist at the time of reference, and not as subsequently modified."[74]

The satellite carriers have previously argued that because Congress did not specifically prohibit the Commission from redefining the term "unserved household," the Commission is free to do so.[75] However, a federal administrative agency has only that authority which Congress expressly delegates to it. Congress naturally and correctly assumed that the Commission would not, because it cannot, exceed its delegated authority. Accordingly, there was no reason for Congress to forbid the Commission from rewriting the terms of the Act because the Commission never had the authority to do so in the first place. When Congress desires for an agency to act to implement a statute the agency does not administer, Congress will specifically authorize or instruct the agency to institute a rulemaking proceeding. Thus, if Congress had intended to authorize the Commission to redefine the term "unserved household," it would have expressly authorized or directed the Commission to initiate a rulemaking proceeding for that purpose. Congress did, in fact, direct the Commission to take such action in connection with a separate, unrelated provision of the Act. The Act expressly directed the Commission to undertake an inquiry and rulemaking proceeding on the feasibility of imposing syndicated exclusivity rules on satellite carriers.[76] Had Congress intended

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[74] *United States v. An Article of Cosmetic Consisting of 1,227 Packages*, 372 F. Supp. 302, 304 (D. Or. 1974) (internal quotation marks and citation omitted) (emphasis added).

[75] *See* Definition of an Over-the-Air Signal of Grade B Intensity for Purposes of the Satellite Home Viewer Act, *Reply of the National Rural Telecommunications Cooperative to Preliminary Response of the National Association of Broadcasters*, RM No. 9335 (dated Aug. 6, 1998) [hereinafter "NRTC Reply to NAB"], at 8 .

[76] *See* H.R. Rep. No. 100-887, pt. 2, at 26 (1988). The Commission complied with that mandate and issued a Report and Order declining to adopt syndex rules for satellite due to technical infeasibility at that time. *See* Imposing Syndicated Exclusivity Requirements on Satellite Delivery (continued...)

for the Commission to redefine the intensity level of a Grade B signal, clearly it would have directed the Commission to implement a rulemaking proceeding for that purpose. Congress did not do so in 1988 when the Act was adopted, nor when the Act was amended in 1994, and it has not done so since.

The *Notice* relies on the authorities previously advanced by the satellite carriers to support the tentative conclusion that Congress did not intend to adopt the then-existing Grade B intensity standards for purposes of the Act: *Lukhard v. Reed,* 481 U.S. 368 (1987), and *Helvering v. Wilshire Oil*, 308 U.S. 90 (1939). Perhaps appealing at first blush, these cases are readily distinguishable and, thus, not pertinent to the legal issue here.

In *Lukhard*, the Supreme Court addressed the issue of whether the Virginia Department of Social Services could change its interpretation of the term "income" as used in the Aid to Families with Dependent Children statute after Congress had amended the statute while a prior agency interpretation was in effect.[77] Similarly, in *Helvering*, the Court addressed the issue of whether the Treasury Department could change its definition of the term "net income" as used in the 1928 Revenue Act after Congress had re-enacted the statute while the prior regulatory interpretation was in effect.[78] In both cases, the Court found that Congress did not intend to enact the agency's prior regulatory interpretation into law.[79] Accordingly, both reinterpretations of the terms were permitted

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(...continued)
of Television Broadcast Signals to Home Satellite Earth Station Receivers, *Report and Order*, Gen. Docket No. 89-89, 68 Rad. Reg. 2d (P & F) 1172 (1991).

[77] *See Lukhard*, 481 U.S. at 372-73.

[78] *See Helvering*, 308 U.S. at 95.

[79] *See Lukhard*, 481 U.S. at 379; *Helvering*, 308 U.S. at 97.

because they were found to be consistent with congressional intent.

Both of these cases are irrelevant to the issue now before the Commission for four reasons: First, in both *Helvering* and *Lukhard*, the Court only faced the issue of whether an agency could interpret terms contained in a statute *administered by that agency*. The Court allowed the agency's re-interpretation in those cases because the agency was charged with administering the statute and, therefore, had the requisite expertise to clarify its terms.[80] In *Lukhard*, the Supreme Court specifically held that the agency's interpretation of the term "income" was entitled to deference under the *Chevron* doctrine, thereby making clear that it was deferring to the agency's decision in light of the agency's expertise regarding a statute it was entrusted to administer.[81] Similarly, although *Helvering* was decided prior to *Chevron*, the Court specifically noted that the Treasury Department was given authority to administer the 1928 Revenue Act.[82] However, when an agency is interpreting a statute that it is not entrusted to administer, courts have uniformly held, as noted earlier, that that interpretation is not entitled to *any* judicial deference. Thus, the Third Circuit has held that "an agency decision is not entitled to . . . deference when it interprets another agency's statute."[83] Because the Commission is not authorized to administer the copyright laws, it is without authority to interpret terms contained in the Copyright Act.

Second, the terms at issue in *Lukhard* and *Helvering* were ambiguous terms purposely left

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[80] *See Lukhard*, 481 U.S. at 378; *Helvering*, 308 U.S. at 100.

[81] *See Lukhard*, 481 U.S. at 376 n.3, 378, 383 (Blackmun J., concurring).

[82] *See Helvering*, 308 U.S. at 102-103.

[83] *See Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988); *see also Illinois Nat'l Guard v. FLRA*, 854 F.2d 1396, 1400 (D.C. Cir. 1988); *Department of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988); *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 286 n.6 (3d Cir.), *cert. denied*, 459 U.S. 988 (1982).

undefined by Congress.[84] In these two cases, Congress did not refer to an existing agency definition of the terms "income" or "net income" when it used them in the statutes. In fact, in both of those cases the Court noted that the terms were ambiguous and did not have fixed administrative interpretations. For example, in *Helvering*, the Court stated that when Congress re-enacted the 1928 Revenue Act, the Treasury Department's interpretation of the term "net income" was in flux, and, consequently, the re-enactment "did nothing more than restore to the phrase net income . . . its original ambiguity."[85] Similarly, in *Lukhard*, the Court noted that the administering agency's interpretation of the term "income" had changed over time.[86] In contrast, the Commission's interpretation of the term "signal of Grade B intensity" is not ambiguous. In fact, this term is defined with mathematical precision in Section 73.683 of the Commission's rules, and the legislative report accompanying the Act expressly referred to that specific Commission rule. Thus, when Congress referred to this definition, it plainly had a fixed and specific Commission definition in mind. As the federal court in the *ABC v. PrimeTime 24* case held, "Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant to defining a new statutory term. . . . It is apparent that Congress has done so here."[87]

Third, in both *Lukhard* and *Helvering*, the Court only allowed the agency's interpretations because those interpretations were consistent with the intent of Congress when it enacted the

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[84] *See Lukhard*, 481 U.S. at 378-79; *Helvering*, 308 U.S. at 100.

[85] *Helvering*, 308 U.S. at 100.

[86] *See Lukhard*, 481 U.S. at 378-79.

[87] *ABC* First Order, 17 F. Supp. 2d at 472.

statute.[88] The First Circuit has held that *Lukhard* stands for the proposition that deference to an agency's interpretations of its organic statute is appropriate *only* if the agency's interpretation "is consistent with the language, purpose, and legislative history of the statute."[89] The language, purpose, and legislative history of the Act have been fully discussed above. Any increase in the Commission's longstanding Grade B signal intensity values would be inconsistent with the principles of localism—the touchstone for any action in this proceeding—and they are, therefore, inconsistent with the plain, unequivocal legislative goals, objectives, and intent of Congress in enacting the Act. The Commission must not act to eviscerate the inherent limitations of the compulsory license granted to satellite carriers. Any such action would exceed the Commission's authority and would be overruled by the courts. It is well-established that "[a]dministrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" must be "reject[ed]."[90]

Finally, in both *Helvering* and *Lukhard,* the Supreme Court allowed the agencies' re-interpretations because it did not want to restrict the authority given to the agency by Congress to conduct a rulemaking proceeding pursuant to its organic statute.[91] As the *Notice* itself recognizes, "[T]he Supreme Court reasoned that if legislation so constrained an agency's ability to conduct rulemaking *under its enabling legislation*, 'the result would be to read into the grant of express administrative powers an implied condition that they were not to be exercised unless, in effect, the

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[88] *See Lukhard*, 481 U.S. at 378-79; *Helvering*, 308 U.S. at 100.

[89] *Wilcox v. Ives*, 864 F2d 915, 925 (1st Cir. 1988).

[90] *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

[91] *See Helvering*, 308 U.S. at 101; *Lukhard*, 481 U.S. at 383.

Congress has consented.'"[92] While correct as far as it goes, this statement stops short of recognizing the posture of this proceeding. In the instant case, the Commission's enabling legislation certainly does **not** authorize the Commission to interpret the Satellite Home Viewer Act. Rather, this authority purportedly is derived from a phrase written into the Copyright Act, viz. "as defined by the Federal Communications Commission." Because the Commission does not administer the Act, any restriction of this purported grant of authority would have no effect on the Commission's ability to "conduct rulemaking under its enabling legislation." Thus, *Helvering* and *Lukhard* are not even apposite, let alone dispositive.

In any event, in reaching the tentative conclusion that Congress did not freeze the Grade B intensity values in the Act, the *Notice* overlooks the recent federal court ruling in *ABC v. PrimeTime 24*. That ruling *is* dispositive of the question of whether Congress intended to codify the Commission's existing Grade B signal intensity standard. The North Carolina court held:

> Although Section 73.683(a) concededly was drafted with other purposes in mind, *Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant in defining a new statutory term. It is apparent that Congress has done so here.* The Act's reference to "an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)" most naturally refers to the dBu's required for a signal of Grade B strength for each particular channel.[93]

The North Carolina court—unlike the Commission—has jurisdiction to interpret and enforce the Act. It has already concluded that Congress "defin[ed]" the term "unserved household" and "adopt[ed] by reference" the Commission's existing Grade B definition. In light of this holding, there can be no question but that the signal strength standards in Section 73.683(a) of the

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[92] *Notice* ¶ 21 (quoting *Helvering*, 308 U.S. at 101) (emphasis added).

[93] *ABC* First Order, 17 F. Supp. 2d at 472 (emphasis added).

Commission's rules have been codified for purposes of the Act and are not subject to subsequent manipulation or revision by the Commission in connection with the Act.

B. The Current Grade B Standard Is A Congressionally Sanctioned Proxy For Acceptable Picture Quality

Even if the Commission had statutory authority to change the Grade B definition for purposes of the Act, there would be no valid public policy reason for doing so. Contrary to arguments by the satellite carriers, the Grade B standard is an accurate measure of acceptable picture quality.

The Grade B standard is an objective proxy developed by the Commission for measuring picture quality. The Commission specifically developed the standard to reflect what it considered to be an acceptable over-the-air picture. In formulating the Grade B standard, the Commission determined that, among its planning factors, a signal-to-noise ratio of 30 dB was sufficient to provide a picture of acceptable quality.[94] Subsequently, this 30 dB figure was confirmed by the Television Allocation Study Organization ("TASO") in the late 1950s. TASO conducted television viewer tests in which a large number of observers rated picture quality. As a result of these tests, it was determined that a signal of Grade B intensity "is of acceptable quality" and that "[i]nterference is not objectionable."[95]

The *Notice* inquires whether "the concept of the quality of service that viewers consider acceptable [has] changed since the Commission adopted the Grade B signal strength levels in the

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[94] *See* Engineering Statement of William R. Meintel [hereinafter "Engineering Statement"], at 2 (attached hereto as Appendix).

[95] *Id.* at 3.

1950s."[96] This question is misdirected. Congress chose the Grade B standard when it adopted the Act in 1988, *and it chose it again in 1994, when it amended the Act.* Thus, the relevant inquiry is whether viewer standards have changed *since 1994*, the most recent date Congress ratified the Grade B standard for purposes of the Act. Obviously, viewer expectations of television picture quality have hardly changed within the last four years.

In fact, the Commission, just last year, *reaffirmed* its Grade B rules, which have served the television broadcasting service well for nearly 50 years. In the DTV proceeding, the Commission ultimately concluded that the existing NTSC Grade B service area should be the basis upon which DTV coverage should be predicated. The Commission's goals were two-fold: first, to provide DTV coverage comparable to a station's current coverage area and, second, to provide the best correspondence between the size and shape of the proposed DTV channel's coverage area and the station's existing coverage.[97] The Commission carefully crafted this approach to "foster the transition to DTV, while simultaneously preserving viewers' access to off-the-air TV service and the ability of stations to reach the audiences *they now serve*."[98] Maintaining viewer "access to the stations that they can now receive over-the-air" was a critical component of the DTV replication scheme.[99] Thus, the value of over-the-air service to both viewers and broadcasters was fundamental

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[96] *Notice* ¶ 27.

[97] *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report and Order*, FCC 97-115, 7 Comm. Reg. (P & F) 994 (1997), ¶ 12; Engineering Statement at 11.

[98] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report and Order*, FCC 97-115, 7 Comm. Reg. (P & F) 994 (1997), ¶ 14 (emphasis added).

[99] *Id.* ¶ 29.

to the Commission's actions. It is ludicrous to suggest that the Commission would have predicated DTV—for which broadcasters are investing millions of dollars—on the existing definition of Grade B service if that service were not, in fact, adequate.

C. A Revision Of The Grade B Rules Generally Would Have An Adverse Impact On Other Policies And Would Create Administrative Inefficiencies

Should the Commission conclude it has the authority to change the Act's Grade B standard, which the Affiliate Associations assert it does not, it would have to change the Grade B intensity levels for *all* regulatory purposes and not *solely* for purposes of the Act. The *Notice* specifically inquires whether the Commission may "promulgate a special definition of Grade B intensity for the exclusive purposes of the Act."[100] As explained above, the Commission has no authority to manipulate the Grade B signal intensity levels Congress adopted when it passed—and later amended—the Act. However, should the Commission decide it does have such authority, it would have to change its Grade B rules for *all* regulatory purposes and not solely for purposes of the Act. As noted earlier, had Congress intended for the Commission to create a special definition of Grade B intensity solely for purposes of the Act, it would have authorized or directed the Commission to conduct a rulemaking for that purpose.[101]

Moreover, a revision by the Commission of the Grade B signal intensity definition for purposes of the Act would constitute a revision and rewrite of the Act by the Commission—something the Commission clearly cannot do. As the court held in *Southwestern Bell Corp. v. FCC*, where "[a statutory] balance was achieved after careful compromise,"

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[100] *Notice* ¶ 22.

[101] *See supra* Parts II, VIII.A.

> [t]he Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite th[e] statutory scheme on the basis of its misconception of the equities of a particular situation. . . . However reasonable the Commission's assessment, we are not at liberty to release the agency from the tie that binds it to the text Congress enacted.[102]

Any changes to the Commission's Grade B levels generally would have adverse ramifications for non-SHVA rules and policies. In particular, the Commission's DTV rules and channel allocations, the public station "must carry" rules, and various other Commission rules would be undermined. As discussed above, and as noted by the Commission in the *Notice*, the DTV service replication models were designed to duplicate the NTSC Grade B service areas of existing stations.[103] Areas receiving an analog signal of Grade B intensity were deemed by the Commission to be "served." Therefore, if the Grade B intensity values are increased, households that are now "served" would be considered "unserved"—a bizarre result.[104] If the Commission determined that some households would be considered "unserved" for analog service, but "served" for DTV service, then a new difficulty would arise: Some households would be eligible for distant analog network service by satellite based on their *unserved analog status* but ineligible for distant DTV network service based on their *served DTV status*. Clearly, Congress did not contemplate a bifurcated service structure for the Act's compulsory copyright license.

Even were other Commission's rules not implicated—which they are—and even were the Commission authorized to promulgate Grade B rules specifically for purposes of the SHVA—which

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[102] *Southwestern Bell Corp. v. FCC*, 43 F. 3d 1515, 1520 (D.C. Cir. 1995) (internal quotation marks and citations omitted).

[103] *See Notice* ¶ 26.

[104] *See* Engineering Statement at 11.

it is not—the result of modifications to the Commission's Grade B rules will create an administrative and regulatory nightmare for the Commission and the public. As the Commission has appropriately noted:

> [I]n a regulatory system engineering rules are administrative tools, and a decision, at any time, to substitute new tools for old, even though they may be demonstrated to be keener and more precise than the ones presently available, inevitably must take into consideration the practical consequences of such action, both with respect to the efficiency, expeditiousness and finality of regulatory processes, and the impact of the rule changes on those whose activities are under the jurisdiction of the regulatory body.[105]

In fact, in an earlier examination of television field strength curves, the Commission recognized that both Grade A and Grade B service contours, although perhaps only originally intended to have nominal significance, had, over time, become efficient administrative tools. The Commission was fully aware that "when a determination requiring the use of these contours produced a result adverse to the interests of a particular party, [that party] sought ways acceptable to the Commission of changing this result, e.g., changing the position of a Grade B contour, predicted by the use of curves, with measurements."[106] Yet the Commission expressly rejected the idea that the Grade B contour should be altered by rule amendment for purposes of cable television regulation. In reaching this conclusion, the Commission reasoned:

> [T]o maintain a set of predicted contours just for cable purposes presents administrative problems. Television licensees would have to submit 2 sets of estimates. Confusion to . . . the public would certainly occur. The expenditure of Commission resources to

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[105] *Notice* ¶ 26 n.59 (quoting Television and FM Field Strength Curves, *Report and Order*, FCC 75-636, 53 FCC 2d 855, 34 Rad. Reg. 2d (P & F) 361 (1975), ¶ 17).

[106] Television and FM Field Strength Curves, *Report and Order*, FCC 75-636, 53 FCC 2d 855, 34 Rad. Reg. 2d (P & F) 361 (1975), ¶ 59.

administer this set of contours would be costly.[107]

The Affiliate Associations, therefore, respectfully submit that manipulation of the Grade B signal intensity levels for purposes of the Act would be manifestly unwise as a matter of public policy and manifestly unsound as a matter of law.

D. If Anything, Grade B Field Strength Values Should Be Revised Downward, Not Upward

For the reasons previously expressed, the Commission does not have authority to increase the Grade B intensity values either specifically for purposes of the Act or as a general matter. In any event, implicit in the *Notice* is an assumption that Grade B intensity levels, if revised at all, should be revised upward. That assumption is 180 degrees wrong. In fact, due to a variety of technological improvements, more households today are capable of receiving an acceptable picture over the air than ever before. If the technical planning factors underlying reception of an acceptable quality picture are revisited by the Commission, the result should be a lowering of the Grade B intensity levels and an expansion of the Grade B coverage contours. In fact, the last time the Commission considered redefining Grade B signal strength, more than 20 years ago, it proposed *lowering—not raising*—the field strength values.[108]

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[107] Signal Strength Contours for Purposes of Cable Television Systems Regulations, *Report and Order*, FCC 77-480, 41 Rad. Reg. 2d (P & F) 121 (1977), ¶ 6.

[108] *See* Television and FM Field Strength Curves, *Report and Order*, FCC 75-636, 34 Rad. Reg. 2d (P & F) 361 (1975), ¶ 46 (discussing proposal to lower Grade B field strength values because "equipment refinements occurring since the original Grade B determinations were made" justified "a reduction in estimated receiver noise figures, an upward revision in values for receiving antenna gain, and a reduction in the assessed effect of transmission line losses"). The Commission ultimately did not adopt the new parameters because there was no "urgent need, from an engineering standpoint, to redefine the Grade B contour, and since other considerations d[id] not make such a course of action expedient," the Commission opted not to pursue it. *Id.* ¶ 49. The Affiliate (continued...)

The Grade B intensity values were originally determined by specifying the median field strength necessary to overcome receiver noise, taking into consideration losses in receiving components, location variability, and time fading, so that the median observer would receive an acceptable picture at least 90% of the time, at the best 50% of locations on the perimeter.[109] The technical planning factors utilized are summarized in the accompanying chart.[110]

Grade B Factors

Parameter	Channels 2 to 6	Channels 7 to 13	Channels 14 to 83
Thermal Noise (@ 300 ohms)	7	7	7
Receiver Noise Figure	12	12	15
Signal-to-Noise Ratio	30	30	30
Transmission Line Loss	1	2	5
Receiving Antenna Gain	(6)	(6)	(13)
Dipole Factor	(3)	6	16
Local Field Intensity	41	51	60
50% Terrain Factor	0	0	0
90% Time Fading Factor	6	5	4
Median Field Intensity	47 dBu	56 dBu	64 dBu

(...continued)
Associations submit that there is still no urgent need, *from an engineering standpoint*, to redefine the Grade B contour or the Grade B intensity levels. But, should the Commission act, that action should be to reduce the Grade B field strength values, not increase them.

[109] *See* Engineering Statement at 6-10.

[110] *See* Television Broadcast Service, *Third Notice of Further Proposed Rule Making*, FCC 51-244, 16 Fed. Reg. 3072, 3080 (Appendix B) (Apr. 7, 1951); Robert A. O'Connor, *Understanding Television's Grade A and Grade B Service Contours*, IEEE Transactions 137, 142 (Dec. 1968) [hereinafter "*Understanding Service Contours*"]; Gary S. Kalagian, *A Review of the Technical Planning Factors for VHF Television Service*, FCC/OCE Bulletin RS 77-01 (Office of Chief Engineer Mar. 1, 1977) [hereinafter "*Technical Planning Factors Review*"], at 4 .

In addition to these factors, the height of the receiving antenna was assumed to be 30 feet. The 30-foot receiving antenna height was chosen because it was "considered typical of the average home installation"[111] circa 1950, and, by the late 1960s, it had "become the industry standard." [112]

The planning factors for receiver noise, transmission line loss, and antenna gain were chosen because they were typical of a receiving installation in outlying or near-fringe areas in the 1950s.[113] The Commission asks whether that which constitutes a "conventional outdoor rooftop receiving antenna" installation has changed since the 1950s.[114] It has. The principal factor that has varied over time, the receiver noise figure, has improved substantially.[115]

Even by the late 1960s, "most receivers [had] noise figures considerably better" than those

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[111] *Understanding Service Contours* at 142.

[112] *Id.*

[113] *See* Engineering Statement at 7.

[114] *Notice* ¶ 27.

[115] The 30 dB signal-to-noise ratio (peak vis. car./RMS noise) was chosen because the Commission determined it would be sufficient to provide a picture of acceptable quality. This 30 dB figure, and thus the Commission's initial judgment, was subsequently confirmed by TASO, which determined that the median observer would rate the picture quality as no less than passable or a TASO Grade 3. *See* Engineering Statement at 2-3. The 30 dB signal-to-noise figure has been used for 50 years now. Detailed empirical studies would be required before it could be determined whether a different ratio is more appropriate. The 7 dBu thermal noise figure represents the inherent thermal noise voltage generated in an ideal receiver, assuming an input resistance of 300 ohms, and, thus, is not subject to change. *See id.* at 4-5. The transmission line loss figures were based on a 50-foot run of twinlead line. *See* Technical Planning Factors Review at 10; Engineering Statement at 4. A run of 50 feet is more than sufficient to cover the distance from an antenna located at 30 feet above the ground to a television receiver. In any event, the loss is essentially negligible, and, if anything, should be reduced further. *See* Television and FM Field Strength Curves, *Report and Order*, FCC 75-636, 34 Rad. Reg. 2d (P & F) 361 (1975), ¶ 46 (recognizing that the originally assessed effect of transmission line losses warranted a reduction).

that had been assumed in the planning factors.[116] By the late 1970s, receiver noise figures were quantified by the Commission's Office of Chief Engineer at 6 dB for low VHF and 7 dB for high VHF, a substantial improvement over the 12 dB figures assumed for VHF in 1951.[117] Even so, those figures are more than 20 years old now. Since the time of the OCE report, virtually all television receivers have incorporated solid-state components. Today, the additional receiver noise figure, beyond the inherent thermal noise of an ideal receiver, has improved substantially with respect to receiver sensitivity.

Moreover, antenna technology has improved significantly since the 1950s and there have been improvements in the typical gain achieved. As stated in one of the satellite industry's own trade journals:

> What consumers don't understand is that antenna technology has improved dramatically over the years and TV stations['] signals are stronger than ever. Today's antennas (you probably sell them in your store) are capable of bringing in a high quality signal for just about every urban or suburban homeowner. And it will almost always be a cleaner, more stable, and more reliable signal than cable TV![118]

Considering, then, reductions in the receiver noise figure of no less than 6 dB, and probably more, and increases in antenna gain, the median Grade B field strength values could be reduced, conservatively, at least 6 dB and still achieve the Commission's original goal of the median observer receiving an acceptable picture at least 90% of the time, at the best 50% of locations on the

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[116] *Understanding Service Contours* at 142; Engineering Statement at 8.

[117] *See Technical Planning Factors Review* at 9. Figures were not provided for UHF.

[118] Bob Shaw, *Customers Get Local Channels Free with Every DSS*, DSS Insider (Winter 1997), at 18.

perimeter.[119] Moreover, this discussion does not even consider the effect of improvements in transmitting antenna technology over the past 50 years.[120]

Thus, more viewers actually receive an acceptable picture at distances farther from the transmitter and tower than ever before. In reality, a local broadcast station's actual service area, as analyzed by the Longley-Rice model, almost always extends well beyond its FCC-predicted Grade B service contour. The network "white area" problem, estimated by the Commission more than 10 years ago to affect fewer than 1 million households,[121] is, in fact, actually much smaller than it is predicted to be, especially when increases in the number of television stations and translators are also taken into account.[122] Therefore, the real issue the Commission should be considering in this proceeding is not relief for the satellite industry, but rather relief for the broadcasting industry. By

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[119] *See* Engineering Statement at 8 (estimating conservatively that "the Grade B signal level values should be reduced by approximately 5 dB or 6 dB. This would mean that the new values would be 41 dBu for low VHF, 50 dBu for high VHF, and 58 dBu for UHF.").

[120] The Affiliate Associations anticipate that the satellite industry will object that these figures do not consider external environmental noise. The Commission has already examined the issue of external noise, and, based upon the laws of physics, determined that the effects of external noise are significant only for low band VHF frequencies, i.e., channels 2 to 6. *See* Television and FM Field Strength Curves, *Report and Order*, FCC 75-636, 34 Rad. Reg. 2d (P & F) 361 (1975), ¶ 46. External environmental noise does not adversely affect the picture quality of UHF stations because of their frequencies. Man-made noise is less prevalent in rural areas as a general matter and is likely to be a factor for VHF stations only in populated urban areas. However, the median ambient signal strength of a local station in such areas is likely to be far in excess of the Grade B level, indeed at Grade A or even city grade level, and thus more than sufficient to overcome the adverse effects of the noise on picture quality.

[121] *See* Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, *Report and Order*, FCC 87-62, 62 Rad. Reg. 2d (P & F) 687 (1987), ¶ 198 (estimating the number of households located in white areas to be "fewer than half a million"); Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, *Second Report and Order*, FCC 88-67, 64 Rad. Reg. 2d (P&F) 910 (1988), ¶ 64 n.41.

[122] *See supra* notes 23-28 and accompanying text.

maintaining artificially high Grade B intensity values, many more viewers are being permitted to subscribe to distant network service than should lawfully be entitled to receive it. In effect, the networks' and affiliates' intellectual property rights are being abused even more widely than generally perceived.

E. An Increase In Grade B Field Strength Values Would Have An Adverse Effect On Local Television Service

The Affiliate Associations have had a series of signal area maps of 12 representative stations prepared by Decisionmark Corp., an independent firm with expertise in producing Longley-Rice signal area maps. We believe these stations to be representative of stations across the country. A station affiliated with one of the four networks was chosen in each of three different size DMA markets: large markets, i.e., with a Nielsen DMA rank between 1 and 25; medium markets, i.e., with a Nielsen DMA rank between 26 and 100; and small markets, i.e., with a Nielsen DMA rank between 101 and 211. Thus there are four representative stations in large markets, four in medium markets, and four in small markets. To yield the greatest variety of information, no market is duplicated. In addition, the stations were also selected so that there would be six VHF (three low VHF and three high VHF) and six UHF stations. The characteristics of these representative stations are summarized in the accompanying table.

Three maps were prepared for each station. All maps were produced using Longley-Rice, version 1.2.2, in point-to-point mode. The grid size was 0.5 km x 0.5 km. Translator stations were not taken into account; consequently, the data *understate* the extent of the stations' actual service areas. The maps are attached as Exhibit 1. These maps are also available for viewing on the Internet at http://www.shva.com/jointaffiliates.

Representative Network Affiliate Stations

Station	*Affiliation*	*DMA*	*DMA Rank*	*Frequency Range*
Large Markets				
WHDH, Channel 7 Boston, MA	NBC	Boston	6	High VHF
WJW, Channel 8 Cleveland, OH	Fox	Cleveland	13	High VHF
KDKA, Channel 2 Pittsburgh, PA	CBS	Pittsburgh	19	Low VHF
WRTV, Channel 6 Indianapolis, IN	ABC	Indianapolis	25	Low VHF
Medium Markets				
WNCN, Channel 17 Goldsboro, NC	NBC	Raleigh-Durham	29	UHF
WBMA, Channel 58 Birmingham, AL	ABC	Birmingham	51	UHF
KBSI, Channel 23 Cape Girardeau, MO	Fox	Paducah-Cape Girardeau-Harrisburg-Mount Vernon	79	UHF
KBTX, Channel 3 Bryan, TX	CBS	Waco-Temple-Bryan	96	Low VHF
Small Markets				
KCVU, Channel 30 Paradise, California	Fox	Chico-Redding	130	UHF
KBMY, Channel 17 Bismarck, ND	ABC	Minot-Bismarck-Dickinson	151	UHF
WJHG, Channel 7 Panama City, FL	NBC	Panama City	157	High VHF
WMDN, Channel 24 Meridian, MS	CBS	Meridian	183	UHF

The first map shows in light blue all locations predicted to receive a signal of at least Grade B intensity and in dark blue all locations predicted to receive a signal of at least Grade A intensity

using the standard Longley-Rice inputs of 50%/50%/50%.

The second map shows in light blue all locations predicted to receive a signal of at least Grade B intensity and in dark blue all locations predicted to receive a signal of at least Grade A intensity using the non-standard, EchoStar-proposed inputs of 99%/99%/99%.

The third map shows in light blue all locations predicted to receive a signal of at least Grade B intensity using modified non-standard inputs of 70%/90%/50%. These third inputs were selected to show the results of less extreme modifications to the input factors.

Accompanying each set of maps are data summaries detailing the population, number of households, and area predicted to be served under each set of parameters, as well as the population, number of households, and area located within the Commission's current predicted Grade B and Grade A contours.

An analysis of this data is provided in Figure 1. The results are startling.